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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

WILLIAM W. NESSON, Petitioner

V

MAUREEN P. MCINTYRE, Respondent

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
STATE OF ILLINOIS SUPREME COURT**

PETITION FOR WRIT OF CERTIORARI

William W. Nesson
Petitioner, pro se
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QUESTIONS PRESENTED

Whether the Summary Dismissal of Petitioner's action violates Due Process of the 14th Amendment of the United States Constitution.

Whether the issuance of a garnishment summons and resulting freezing of retirement accounts is a seizure under the 4th Amendment of the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

WILLIAM WARREN NESSON, *Petitioner*

v.
MAUREEN P. McINTYRE, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE
OF ILLINOIS SUPREME COURT

William Warren Nesson respectfully petitions for a writ of certiorari to review the judgment of the State of Illinois Supreme Court in this case.

OPINIONS BELOW

The order of the State of Illinois Supreme Court, denying leave to appeal. (App., 1a) The opinion of the Appellate Court of the State of Illinois, Second Judicial District (App., 2a-4a) is unreported. The opinion of the Circuit Court of the 19th Judicial Circuit, McHenry County Illinois (App., 5a-6a).

JURISDICTION

The Illinois Supreme Court denied leave to appeal January 31, 1996 (App., 1a). The jurisdiction of this Court is invoked under 28 U.S.C. para. 1257.

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution, which states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the United States Constitution, which states in part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

735 ILCS 5/12-1005 (West 1992) (State of Illinois Statutes), which states:

Liability for seizing exempt property. If any officer by virtue of any judgment or process, or any other person by any right of distress takes or seizes any of the articles of property exempted from levy and sale, as provided in Part 10 of Article XII of this Act, such officer or person shall be liable in a civil action to the party damaged for double the value of the property so illegally taken or seized and costs of the action.

735 ILCS 5/12-1006 (West 1992) (State of Illinois Statutes), which states in part:

Exemption for retirement plans. (a) A debtor's interest in or

right, whether vested or not, to the assets held in or to receive pensions, annuities, benefits, distributions, refunds of contributions, or other payments under a retirement plan is exempt from judgment, attachment, execution, distress for rent, and seizure for the satisfaction of debts if the plan (i) is intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code of 1986, as now or hereafter amended, or (ii) is a public employee pension plan created under the Illinois Pension Code, as now or hereafter amended.

(b) "Retirement plan" includes the following:

- (1) a stock bonus, pension, profit sharing, annuity, or similar plan or arrangement, including a retirement plan for self-employed individuals or a simplified employee pension plan;
- (2) a government or church retirement plan or contract;
- (3) an individual retirement annuity or individual retirement account;

STATEMENT OF THE CASE

Respondent sued Maureen P. McIntyre on December 20, 1993 in the Circuit Court of the 19th Judicial Circuit, McHenry County Illinois. Respondent alleged that Defendant was liable under Illinois Statute 735 ILCS 5/12-1005 as the result of the garnishment and freezing of his exempt retirement accounts. The action was dismissed without trial upon the finding that the accounts had not been seized. That Summary Dismissal is being appealed.

The Defendant, one of the attorneys of record for Petitioner's wife in a Dissolution of Marriage proceeding, issued a garnishment summons to the brokerage firm holding subject retirement accounts and referred to those retirement accounts by account number. As a result, those accounts were frozen until a court order was obtained unfreezing the accounts. The Defendant did not personally obtain possession of any of the assets in these accounts.

PROCEEDING BELOW

Defendant filed a motion for Summary Dismissal advocating that there had not been a "seizure" since she had not obtained possession of the retirement accounts. The Circuit Court granted this motion for Summary Dismissal. Petitioner filed a motion to vacate the summary dismissal and cited:

"A 'seizure' of property within the meaning of the Fourth Amendment occurs when there is some meaningful interference with an individual's possessory interests in that property. this definition follows from the oft-repeated definition of the "seizure" of a person within the meaning of the Fourth Amendment, that is, meaningful interference, however brief, with an individual's freedom of movement." *U. S. v. Jacobsen* U. S. Minn., 446 U. S. 109, 104 S. Ct. 1652, 1656:

The motion to vacate the summary dismissal was denied by the Circuit Court.

Petitioner appealed to the Appellate Court of the State of Illinois, Second Judicial District alleging that the Circuit Court had erred in allowing the motion for summary dismissal, and that there had been a seizure as defined in *U.S. v. Jacobsen* *id*. The Appellate Court upheld the trial court's summary dismissal of the case in a non published decision dated October 3, 1995 (App., 2a-4a) finding that there had been no "seizure" because the property had not been taken by the defendant. Petitioner filed a motion for reconsideration which was denied.

Petitioner again raised these issues in a Petition for leave to appeal to the Illinois Supreme Court filed December 12, 1995. The Illinois Supreme Court denied petition for leave to appeal on January 31, 1996.

REASONS FOR GRANTING THE WRIT

The trial court dismissed the action upon determining that there had not been a seizure. The Appellate Court affirmed the decision that there had been no "seizure" because the property had not been taken. These

courts disregarded without explanation that your Court has defined seizure of property to be meaningful interference with an individual's possessory interests in that property. *U. S. Jacobsen* *id* also *Soldal v. Cook County, Ill.*, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992).

Whether or not the issuance of a garnishment summons, and the related freezing of the retirement accounts is "meaningful interference with an individual's possessory interest" is a question that warrants trial. The lower court's summary dismissal is in error and should be reversed. It is proper for this Court to exercise its supervisory authority in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William W. Nesson

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APPENDIX

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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January 31, 1996

Mr. William W. Nesson
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No. 80266 - William W. Nesson, petitioner, v. Maureen P. McIntyre,
respondent. Leave to appeal, Appellate Court, Second
District.

The Supreme Court today DENIED the petition for leave to appeal
in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on
February 22, 1966.

FILED OCT 03 1995

No. 2-95-0286

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

WILLIAM W. NESSON,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellant,)	
)	No. 93-LM-667
v.)	
)	
MAUREEN P. McINTYRE,)	Honorable
)	Ward S. Arnold,
Defendant-Appellee.)	Judge, Presiding.

SUMMARY ORDER

Plaintiff, William W. Nesson, appeals the trial court's order granting summary judgment to defendant, Maureen P. McIntyre. We affirm.

Defendant, an attorney, represented plaintiff's spouse, Gloria Nesson, in her dissolution of marriage case (In re Marriage of Nesson (Cir. Ct McHenry Co.), No. 89-D-450). In cause No. 89-D-450, defendant filed an affidavit for nonwage garnishment with the trial court on January 29, 1992. On January 31, 1992, garnishment summons was served on Olde Discount Corporation. Defendant never sought a judgment or turnover order for the Olde Discount accounts. At defendant's request, the trial court released the nonwage garnishment on March 9, 1992.

In the present case, plaintiff filed his complaint on December 20, 1993, alleging that defendant is liable for seizing exempt property pursuant to section 12-1005 of the Code of Civil Procedure (Code) (735

ILSC 5/12-1005 (West 1992)). The trial court granted defendant's motion for summary judgment on February 2, 1995.

On appeal, plaintiff's only contention is that the trial court erred by not ruling that defendant seized plaintiff's exempt property. Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. (735 ILCS 5/2-1005(c) (West 1992).) We conduct a *de novo* review of an order granting summary judgment. Ahlgren v. Blue Goose Supermarket, Inc. (1994), 266 Ill. App. 3d 154, 160.

Section 12-1005 of the Code provides for civil liability where a person "takes or seizes any of the articles of property exempted from levy and sale." (735 ILCS 5/12-1005 (West 1992).) Both parties agree that the Olde Discount accounts qualify as exempt property pursuant to section 12-1006 of the Code (735 ILCS 5/12-1006 (West 1992)). Accordingly, the only issue before this court is whether the issuance of the garnishment summons constituted a seizure under section 12-1005 of the Code.

Pursuant to section 12-707(a) of the Code (735 ILCS 5/12-707(a) (West 1992)), service of the garnishment summons creates a lien in favor of the judgment creditor on the property held by the garnishee. (In re Marriage of Souleles (1982), 111 Ill. App. 3d 865, 872-73.) The lien remains on the property pending the garnishment proceeding. (735 ILCS 5/12-707(a) (West 1992).) The garnishee has a duty to hold the debtor's property in the garnishee's possession, custody, or control, subject to the entry of the garnishment judgment. (Souleles , 111 Ill. App. 3D at 873; 735 ILCS 5/12-707(a) (West 1992).) The garnishee lacks the authority to disburse funds prior to the entry of the garnishment judgment. Souleles , 111 Ill. App. 3d at 873.

In the present case, the garnishment summons was served on Olde Discount; however, defendant never sought a judgment or turnover order for the exempt property. Accordingly, the summons only created a lien on the property. (See Souleles , 111 Ill. App. 3d at 872-73.) At all times, Olde Discount held the property, never turning it over to defendant. Furthermore, Olde Discount was legally prohibited from turning the property over to defendant in the absence of a garnishment judgment. (See Souleles , 111 Ill. App. 3d at 873.) Since Olde

Discount held the property and lacked the legal authority to disburse the property to defendant, we conclude that the lien on the property was not equivalent to a seizure of the property by defendant. We hold that defendant did not take or seize the property.

We affirm the judgment of the circuit court in accordance with Supreme Court Rules 23 (c) (2) and (c) (5) (Official Reports Advance Sheet No. 15 (July 20, 1994), Rules (c) (5) , effective July 1, 1994).

Affirmed.

COLWELL, J., with BOWMAN and RATHJE, JJ., concurring.

IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

WILLIAM NESSON)	
)	
Plaintiff,)	
)	
VS.)	No. 93 LM 667
)	
MAUREEN P. MCINTYRE,)	
)	
Defendant.)	

OPINION and ORDER

This cause came on for hearing on Cross Motions for Summary Judgment. The attorneys have argued those motions and provided the court with applicable case law.

The Court has read the cases tendered by both sides and finds that a central theme runs throughout. Chapter 735 ILCS, Section 5/12-1005 requires a seizure of Plaintiff's property pursuant to a garnishment summons and provides a method for recovery of damages in the event of a wrongful seizure. The word "seizure" in its common meaning requires the person seizing the property to take hold of or take custody of the property.

Defendant herein never took possession of Plaintiff's property nor was it confiscated in any way. Plaintiff suffered no damages or loss of interest income. At most, Plaintiff's exempt accounts were "frozen" for a period of 33 days, not "seized". Moreover, Plaintiff herein did not challenge the garnishment under any appropriate statutory provision.

Because the Court finds that the Plaintiff's property was not "seized" as required by the statute nor did Plaintiff suffer any damage, the Court finds in favor of the Defendant MAUREEN P. MCINTYRE and against

Plaintiff, WILLIAM NESSON. Accordingly, Defendant's Motion for Summary Judgment is hereby granted and Plaintiff's is denied.

DATED: February 2, 1995

S.S. _____
WARD S. ARNOLD
Judge